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No. 91-794

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

HENRY HARPER, *et al.*,
Petitioners,

v.

VIRGINIA DEPARTMENT OF TAXATION,
Respondent.

On Writ of Certiorari to the Supreme Court of Virginia

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF TAX EXECUTIVES INSTITUTE, INC. AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF TAX EXECUTIVES INSTITUTE, INC. IN SUPPORT OF NEITHER PARTY OUT OF TIME

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Tax Executives Institute, Inc., by and through its counsel, Timothy J. McCormally, hereby moves this Court for leave to file Tax Executives Institute's Brief *Amicus Curiae* in Support of Neither Party in the above-captioned case out of time, and in support of this motion states, as follows:

1. That Timothy J. McCormally is General Counsel and Director of Tax Affairs for Tax Executives Institute, Inc. and Counsel of Record for the Institute;

2. That Tax Executives Institute, Inc. has obtained the written consents of both the Petitioners and the Re-

spondent to file a Brief *Amicus Curiae* in Support of Neither Party and that said consents have been filed with the Clerk of this Court;

3. That, pursuant to Rule 37.3 of the Rules of this Court, the Institute's brief was due to be filed at the same time as Petitioners' brief on the merits which was filed on July 17, 1992;

4. That, owing in part to oral and written communications with counsel for the Petitioners and Respondent, Mr. McCormally mistakenly believed that the Institute's brief was due to be filed at the same time as Respondent's brief on the merits and that a copy of the Institute's brief is enclosed with this Motion;

5. That Respondent's brief on the merits is currently due to be filed by September 8, 1992, and that on this 12th day of August 1992, copies of the Institute's brief are being filed with the Court, sent to both parties by messenger or by overnight-delivery service, and served by first-class mail.

WHEREFORE, it is respectfully requested that Tax Executives Institute's Motion for Leave to File a Brief *Amicus Curiae* in Support of Neither Party Out of Time be granted.

Respectfully submitted,

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August 12, 1992

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BRIEF OF TAX EXECUTIVES INSTITUTE, INC. AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

INTEREST OF AMICUS CURIAE

Pursuant to Rule 37 of the Rules of this Court, Tax Executives Institute, Inc. respectfully submits this brief as *amicus curiae* in support of neither party.[1] Tax Executives Institute (hereinafter "TEI" or "the Institute") is a voluntary, non-profit association of corporate and other business executives, managers, and administrators who are responsible for the tax affairs of their employers. The Institute was organized in 1944 and currently has approximately 4,700 members who represent more than 2,000 of the leading corporations in the United States and Canada.

The members of the Institute represent a cross-section of the business community in North America, and the

[1] Tax Executives Institute has received the written consents of the Petitioners and Respondent to the filing of this brief; those consents have been filed with the Clerk of the Court.

companies represented by the Institute's membership are, almost without exception, engaged in interstate commerce. The Institute is dedicated to promoting the uniform and equitable enforcement of the tax laws throughout the Nation, to reducing the costs and burdens of administration and compliance to the benefit of both the government and taxpayers, and to vindicating the Commerce Clause and related Due Process and Equal Protection rights of all taxpayers.

This case addresses the extent to which a State may limit the application of a decision by this Court that a state tax statute violates the Constitution by choosing to apply that decision on a prospective-only basis. In 1989, the Court held in *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989), that 4 U.S.C. § 111 (1985) and the constitutional doctrine of intergovernmental tax immunity (as derived from the Supremacy Clause) prohibit the States from taxing federal annuitants more harshly than state annuitants. First in March 1991 and then again in November 1991, the Virginia Supreme Court, applying the standard set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), concluded that the Court's finding of unconstitutionality should apply on a prospective-only basis. Consequently, the Virginia court denied the Petitioners' claims for refunds in respect of the unconstitutionally imposed and collected taxes. 401 S.E.2d 868, 874 (Va. 1991), *reprinted at* Appendix C to Henry Harper's Petition for a Writ of Certiorari to the Supreme Court of Virginia (App.), at 17a (March 1, 1991, Decision of the Supreme Court of Virginia); 410 S.E.2d 629, 632 (Va. 1991), *reprinted at* App. A, at 5a (November 8, 1991, Decision of the Supreme Court of Virginia). It is this conclusion that Petitioners—federal annuitants—seek to overturn.

The Institute's members and the companies by whom they are employed have no direct interest in the resolution of this case, nor the consequent vindication or frustration of the constitutional doctrine of intergovernmental tax immunity. They do, however, have a keen and vital

interest in the resolution of the prospective-only issue. The Court's decision in this case promises to affect far more than the Commonwealth of Virginia's or other States' authority to retain the unconstitutional taxes they have collected from a discrete class of individual taxpayers. Indeed, the strength and vitality of this Court's holdings on Commerce Clause, Equal Protection, and Due Process issues may well be affected. If the Court does not clarify the standard to be used in determining whether a prior decision should be given retroactive effect, other States may well conclude that the Constitution does not bar either the *enactment* of tax statutes that discriminate against interstate commerce or even the *collection* of unconstitutional taxes *pendente lite*, but rather only the continual collection of such taxes after the unconstitutionality of the statutes is explicitly confirmed by the Court. Indeed, a disturbing trend in that direction can already be discerned. *See, e.g., Ashland Oil, Inc. v. Rose*, 350 S.E.2d 531, 536 & n.10 (W. Va. 1986) (the Court's decision in *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984), held to apply only to Armco), *appeal dismissed for want of final judgment*, 481 U.S. 1025 (1987), *rev'd sub nom., Ashland Oil, Inc. v. Caryl*, 110 S. Ct. 3202, 3205 (1990) (per curiam). (*Armco* applies retroactively because case did not establish new principle of law); *National Can Corp. v. Washington Dep't of Revenue*, 749 P.2d 1286, 1287 (Wash.) (the Court's finding of unconstitutionality in *Tyler Pipe Industries v. Washington Department of Revenue*, 483 U.S. 232 (1987), held to apply on a prospective-only basis), *appeal dismissed and cert. denied*, 486 U.S. 1040 (1988).

Obversely, if the Court clearly enunciates the standard to be used in determining the retroactive effect to be given to decisions holding tax statutes to be unconstitutional, the rights of all taxpayers to be free from taxes that impose undue burdens on interstate commerce (or otherwise contravene the Constitution) will be vindicated and the Commerce Clause and other affected provisions of the Constitution will be vivified.

Because TEI members and the companies by whom they are employed will be materially affected by the application of the Court's decision, the Institute has a special interest in the outcome of this case.

SUMMARY OF ARGUMENT

This case addresses the extent to which a State may limit the application of a decision by this Court that a state tax statute violates the Constitution by choosing to apply that decision on a prospective-only basis. In 1989, the Court held in *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989), that 4 U.S.C. § 111 (1985) and the constitutional doctrine of intergovernmental tax immunity prohibit the States from taxing federal annuitants more harshly than state annuitants. First in March 1991 and then again in November 1991, the Virginia Supreme Court concluded that the Court's finding of unconstitutionality should apply on a prospective-only basis. Consequently, the Virginia court denied the Petitioners' claims for refunds in respect of the unconstitutionally imposed and collected taxes. It is this conclusion that Petitioners—federal annuitants—seek to overturn.

The last decade has seen an almost unprecedented number of state taxing statutes struck down as unconstitutional. For example, in *Tyler Pipe Industries v. Washington Department of Revenue*, 483 U.S. 232, 248 (1987), the Court invalidated the multiple activities exemption of Washington State's business and occupation (B&O) tax as repugnant to the Constitution's Commerce Clause. Other decisions have struck down similarly flawed statutes. *See, e.g., James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439, 2441 (1991) (invalidating Georgia's liquor excise tax); *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 46 (1990) (invalidating a similar statute in Florida); *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266, 286 (1987) (holding Pennsylvania's highway use tax unconstitutional); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 273 (1984) (holding Hawaii's exemption of local products from the liquor

excise tax unconstitutional); *Armco, Inc. v. Hardesty*, 467 U.S. 638, 645-46 (1984) (holding West Virginia's B&O tax contravened the Commerce Clause). Finally, in *Davis* the Court held that the constitutional doctrine of intergovernmental tax immunity and the applicable federal statute precluded the State of Michigan from taxing federal annuitants more harshly than it taxed state annuitants.

The States, however, have almost uniformly resisted efforts to refund the taxes that they had collected under invalidated laws. This refusal to pay refunds—or to fashion other meaningful remedies—has commonly been rationalized on equity grounds by applying the three-prong test set out in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971): (1) whether the decision establishes a new principle of law; (2) whether, based on the history of the rule in question, its purpose, and effect, the nonretroactive application will advance or retard the operation of the new rule; and (3) whether nonretroactive application is necessary to avoid injustice or hardship.

Amicus TEI believes that the decisional framework offered by *Chevron Oil* can be useful in assessing whether the Court's decisions should be given prospective-only effect. A properly applied *Chevron Oil* test will render a proper result. Regrettably, history teaches that many States may be unable or unwilling to apply the test in a prudent and constitutionally sound manner. The cumulative effect of the States' refusal to apply the decisions of this Court retroactively necessitates that the standard be clarified and strengthened. Absent such clarification, the principles and holdings of the Court's decisions may well be eviscerated, thereby leaving both the prevailing party and other taxpayers with a hollow victory.

Consider first *Chevron Oil's* "new principle" test: Did the Supreme Court decision striking down a state taxing scheme establish a "new" constitutional principle? The cases show that, from the States' perspective, "new" is in the eye of the beholder and anything that restricts the

States' taxing authority may be labelled as "new." Too frequently, the States define "new principle" simply to suit their needs.

Chevron Oil's second test addresses whether nonretroactive application of the new rule will advance or retard the operation of that rule. That the States routinely misapprehend the import of the standard is demonstrated by the state courts' decisions in *National Can Corp. v. Department of Revenue*, 749 P.2d 1286 (Wash. 1988), and *American Trucking Ass'ns v. Gray*, 746 S.W.2d 377 (Ark. 1988), as well as by the lower court opinions in this case. The courts in these cases failed to recognize that the purpose of constitutional adjudication is not merely to vindicate the rights of the litigants before the Court or even those of identically situated taxpayers. Rather, it is to effectively discourage future violations of those rights. Under the States' reading of *Chevron Oil's* purpose test, a ruling of unconstitutionality would never be applied retroactively.

The States' application of the inequity test in *Chevron Oil* is particularly troubling. Under *Chevron Oil*, the issue is whether prospective application is necessary to avoid injustice or undue hardship. The state courts have focused on the State's reliance on the unconstitutionally imposed and collected taxes, stating, for example, that "the expenditures made from this revenue . . . cannot be undone, and reimbursement at this point would pose a significant hardship upon the State's existing financial requirements." *National Can Corp., supra*, 749 P.2d at 1293. There are also references to the "unconscionable windfall" that the petitioners would purportedly receive if refunds were ordered. *American Trucking Ass'ns v. Gray*, 746 S.W.2d at 379.

Amicus TEI believes that the States' "windfall"/"inequity" analysis focuses on the wrong party. The issue is not whether a taxpayer might enjoy a benefit from lodging a successful challenge to an unconstitutional statute. Rather, it is whether there are factors present that, de-

spite the losing State's culpability, militate against the general rule of retroactivity. Thus, the inequity test measures the hardship or injustice that might befall the State and balances that hardship against the right (constitutional or economic) that would be fully vindicated only by the retroactive application of the decision.

Far too frequently, the States have ignored or misconstrued all three of *Chevron Oil*'s tests. Their failure to analyze *Chevron Oil* properly, if not rectified, could be used to sanction prospective-only application in respect of virtually all decisions declaring state tax statutes unconstitutional. Such a result would be pernicious—nullifying the Court's decisions on constitutional issues and frustrating the policy underlying the Commerce Clause, as well as the Equal Protection, Due Process, and Supremacy Clauses.

The States' application of *Chevron Oil* to a variety of cases confirms the need to clarify the applicable standard. The cases vividly illustrate that the States, at best, misunderstand the balance that is to be struck in considering the retroactivity question and, at worst, have virtually no regard for the policies underlying the Commerce Clause, Due Process Clause, and Equal Protection Clause, or for the precedents of this Court. In light of the States' repeated misapplication of the *Chevron Oil* standard, it may be appropriate for the Court not only to clarify and thereby vivify that standard, but to give consideration to the adoption of a new standard in respect of state tax statutes found to violate the Commerce Clause and other constitutional provisions. In criminal cases, the Court has already insisted on full retroactivity. *Griffith v. Kentucky*, 479 U.S. 314 (1987). Where the Commerce Clause or related Due Process or Equal Protection rights of taxpayers are implicated—or where, as here, the Supremacy Clause is involved and the litigant is not the United States but ancillary beneficiaries—a vivified *Chevron Oil* standard should permit prospective-only treatment only in rare cases. Because the States have it within their power to enact constitutional tax statutes,

they should be held to a higher standard in obtaining exceptions to the general rule of retroactivity. As the Court so forcefully proclaimed in *Griffith v. Kentucky*: "The time for toleration has come to an end." 479 U.S. at 323 (*quoting United States v. Johnson*, 457 U.S. 537, 555-56 n.16 (1982)).

ARGUMENT

I.

The last decade has seen an almost unprecedented number of state taxing statutes struck down as unconstitutional. For example, in *Tyler Pipe Industries v. Washington Department of Revenue*, 483 U.S. 232, 248 (1987), the Court invalidated the multiple activities exemption of Washington State's business and occupation (B&O) tax as repugnant to the Constitution's Commerce Clause. *See* U.S. Const. art. I., § 8, cl. 3. This decision was preceded by *Armco, Inc. v. Hardesty*, 467 U.S. 638, 645-46 (1984), in which the Court held that the State of West Virginia's B&O tax similarly contravened the Commerce Clause.

The Court was also impelled to strike down a state taxing scheme in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), which involved the State of Hawaii's exemption of local products from the liquor excise tax. In that case, the Court concluded that the tax constituted unacceptable "economic protectionism" and therefore contravened the Commerce Clause. *Id.* at 273. This holding was reinforced by the Court's decisions in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 46 (1990), and *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439, 2441 (1991), which struck down comparable statutes in Florida and Georgia, respectively.

In *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987), the Court considered the constitutionality of Pennsylvania's highway use tax. It invalidated the law on the grounds that it impermissibly imposed a heavier tax burden on out-of-state businesses that compete in an interstate market than it imposed on its own residents

who also engage in commerce among the States.[2] *Id.* at 286.[3]

Finally, in *Davis v. Michigan Department of Treasury*, 489 U.S. 803, 817 (1989), the Court held that the constitutional doctrine of intergovernmental tax immunity, which is derived from the Supremacy Clause (U.S. Const. art. VI, cl. 2), and the applicable federal statute (4 U.S.C. § 111 (1985)) precluded the State of Michigan from taxing federal annuitants more harshly than it taxed state annuitants.[4]

In many ways these cases are dissimilar. They involved different types of statutes (though with the exception of *Davis*, they all implicated the Commerce Clause rights of interstate businesses).[5] There are, however, two attrib-

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[2] *See also Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 882-83 (1985) (holding unconstitutional the State of Alabama's discriminatory tax on foreign insurers).

[3] In *American Trucking Ass'ns v. Smith*, 496 U.S. 197 (1990), a divided Court declined to hold that its decision in *Scheiner* must apply retroactively.

[4] Twenty-two other States—including the Commonwealth of Virginia—had enacted laws similar to the one struck down in *Davis*. *Swanson v. North Carolina*, 407 S.E.2d 791, 792 (N. Car. 1991), *petition for cert. pending*, 60 U.S.L.W. 3655 (U.S. March 24, 1992) (No. 91-1436).

[5] There are at least two aspects of the present case that distinguish it from Commerce Clause cases. As already noted, this case involves the effective implementation of the Constitution's Supremacy Clause and, specifically, the constitutional doctrine of intergovernmental tax immunity. In some respects, the doctrine of intergovernmental tax immunity may be seen as more important than the Commerce Clause (or related constitutional provisions) because it affects the basic structure of the American system of government and the relationship of the federal government to the States. *See* Note, *Retroactivity of Refund Claims for Unconstitutional State Taxes: How Helpful is the* Chevron Oil *Test?* American Trucking Ass'n v. McNulty, United States v. City of Spokane, James B. Beam Distilling Co. v. Georgia, 45 Tax Lawyer 889, 895 (1992). For this very reason, however, the aggrieved taxpayers might properly be viewed as ancillary—rather than primary—beneficiaries of the constitutional provisions. In contrast, the very pur-

utes they share. First, they all involved a finding by this Court that the State had violated the Constitution in collecting a tax that was not imposed (or not imposed to the same extent) on a favored class of taxpayers (be they domestic businesses or state annuitants). Secondly, each of them triggered the same reaction by one or more States that imposed similarly unconstitutional taxes: a decision to apply the Court's holdings on a prospective-only basis. That is to say, even after the Court struck down the statutes as contravening the Constitution, the States resisted efforts to refund the taxes that they had collected under the invalidated laws.[6]

The States' refusal to pay refunds—or to fashion other meaningful remedies for taxpayers who have suffered the unconstitutional wrong—has commonly been rationalized on equity grounds. The States have essentially argued that the statutes at issue had been enacted in good faith, that the monies collected under those discriminatory statutes had already been spent, and that the issuance of re-

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pose of the Commerce, Due Process, and Equal Protection Clauses is to protect and vindicate the rights of individuals.

The second unique aspect of this case is the presence of a federal *statute*—4 U.S.C. § 111 (1985)—which was crafted with a much more specific purpose than provisions of the Constitution. Accordingly, the question exists whether the same standards—such as those enunciated by the Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971)—should even be applied to the retroactivity issue or rather, in furtherance of the Supremacy Clause, a more absolute rule should obtain.

[6] The refusal to apply the Court's holdings on a retroactive basis, however, has not been universal. For example, following the decision in *Davis*, courts in several States ordered refunds to be issued to affected federal annuitants. *Pledger v. Bosnick*, 811 S.W.2d 286, 292 (Ark. 1991), *petition for cert. pending*, 60 U.S.L.W. 3173 (U.S. Sept. 13, 1991) (No. 91-375); *Kuhn v. Colorado*, 817 P.2d 101, 110 (Colo. 1991), *cert. dismissed*, 112 S. Ct. 1925 (1992); *Hackman v. Director of Revenue*, 771 S.W.2d 77, 81 (Mo. 1989) (en banc), *cert. denied*, 493 U.S. 1019 (1990); *Burns v. New Mexico*, No. SF 89-1314(c) (1st Jud. Dist. Santa Fe County, April 5, 1990). *See also In re Schirck*, No. 90-5201 RPD (Tax Comm'r of W. Va., Sept. 23, 1991).

funds would threaten the fiscal well-being of the States. In reaching this result, the States have employed the analysis set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). In that case, the Court held that, in determining whether a decision should be applied on a prospective-only basis, the following three factors should be considered:

- *New Principle*: Whether the decision establishes a new principle of law or involves an issue of first impression whose resolution was not clearly foreseen.
- *Purpose*: Whether, based on the history of the rule in question, its purpose, and effect, the nonretroactive application will advance or retard the operation of the new rule.
- *Inequity*: Whether nonretroactive application is necessary to avoid injustice or hardship.

Id. at 106-07 (paraphrased).[7] *Accord American Trucking Ass'ns v. Smith*, 496 U.S. 167, 179 (1990). *See* Philip M. Tatarowicz, *Right to a Refund for Unconstitutionally Discriminatory State Taxes and Other Controversial State Tax Issues under the Commerce Clause*, 41 Tax Lawyer 103, 138-39 (1987).

Before turning to the standards set forth in *Chevron Oil*, however, *amicus* TEI wishes to emphasize that although the Constitution neither prohibits nor requires retrospective effect, *Linkletter v. Walker*, 381 U.S. 618,

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[7] The *Chevron Oil* case itself did not involve the retroactive effect to be given to a ruling of *unconstitutionality*. Rather, the case addressed the reach of a decision that Louisiana's statute of limitations governed claims for personal injuries sustained on the Outer Continental Shelf off the coast of Louisiana. In *Chevron Oil*, the Court held that its decision in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), should not apply retroactively to litigants who had relied on several federal cases holding that admiralty law (specifically, the doctrine of laches) controlled the issue. 404 U.S. at 107-09. In *Griffith v. Kentucky*, 479 U.S. 314 (1987), which changed the analysis to be used in criminal procedure cases, the Court stated that *Chevron Oil* continued to govern civil cases. 479 U.S. at 322 n.8.

629 (1965), the rule remains that "a legal system based on precedent has a built-in presumption of retroactivity." *Solem v. Stumes*, 465 U.S. 638, 642 (1984). *Accord Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 608 (1987). *See generally* Lawrence H. Tribe, *American Constitutional Law* 29-30 & n.20 (2d ed. 1988); John E. Nowak & Ronald D. Rotunda, *Constitutional Law* § 11.9, at 412 412 n.28 (4th ed. 1991).[8] Although exceptions to the rule of retroactivity may be recognized as a matter of policy, the exceptions should be narrowly construed: they should not swallow the rule.[9] Thus, the *Chevron Oil* construct is an instrument to be wielded cautiously. If it is not, the principles and holdings of the precedent to which it is being applied (*e.g.*, the ruling in *Davis* in the instant case) may well be eviscerated, thereby leaving both the prevailing party and other taxpayers with a hollow victory.

Amicus TEI also wishes to stress that the choice-of-law principle set forth by this Court in *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991), may restrict or preclude the application of the *Chevron Oil* standard in particular cases. In *Beam*, Justice Souter wrote for the Court that—

> [W]hen the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata.

111 S. Ct. at 2448. Thus, if the Court in the original action applies its holding to the parties then before the Court, the earlier case "should be read as having retroactively applied the rule there decided." *Id.* at 2445 (foot-

[8] The general rule can be traced to Blackstone. 1 William Blackstone, *Commentaries* *70-71; *see Norton v. Shelby County*, 118 U.S. 425, 442 (1886); *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801).

[9] *See EEOC v. Vuitech*, 842 F.2d 936, 941-42 (7th Cir. 1988) ("[t]he presumption [is] strongly in favor of retroactive application").

notes omitted). The Court's rejection of "selective prospectivity" should thus be seen to vindicate the general rule of retroactivity while not precluding the application of *Chevron Oil* in an appropriate, albeit narrower, class of cases.

II.

Amicus TEI believes that the decisional framework offered by *Chevron Oil* can indeed be useful in assessing whether the Court's decisions should be given prospective-only effect. A properly applied *Chevron Oil* test will render a proper result. Regrettably, history teaches that many States may be unable or unwilling to apply the test in a prudent and constitutionally sound manner. Indeed, too many of the States have chosen to interpret the three prongs of the Court's holding in a self-serving, result-oriented manner. As the matter now stands, the States in their quest for revenue have transmogrified the three-part test of *Chevron Oil* into a standard so pliable that virtually all rulings of unconstitutionality could be applied, at a State's choosing, on a prospective-only basis. Whereas a nonretroactive result in a given case may not, by itself, manifest a need to supplant *Chevron Oil*, the cumulative effect of all the States' actions necessitates that the standard be clarified and strengthened.

A. Did the Prior Decision Establish A New Principle?

Consider first *Chevron Oil*'s "new principle" test: Did the Supreme Court decision striking down a state taxing scheme establish a "new" constitutional principle? 404 U.S. at 106.[10] From the States' perspective, "new" is in the eye of the beholder and, as the beholder, the States have

[10] The first *Chevron Oil* factor is, of course, a threshold requirement for prospective-only treatment: *if the principle was extant at the time of the decision, then the decision must be applied retroactively. See United v. Johnson*, 457 U.S. 537, 550 n.12 (1982) (if this "new principle" standard is not met, *Chevron*'s other two factors need not be considered; the decision will be applied retroactively).

too routinely labelled anything that stands in the way of their taxing authority as "new."

For example, in *National Can Corp. v. Department of Revenue*, 749 P.2d 1286 (Wash.) (en banc), *appeal dismissed and cert. denied*, 486 U.S. 1040 (1988), the Washington court nimbly concluded that the Court's decision in *Tyler Pipe*, *supra*, represented a clear break from prior rulings, even though those prior rulings were expressly relied on by the Court in *Tyler Pipe*. 749 P.2d at 1288-90; *see Tyler Pipe*, 483 U.S. at 241-43 (citing, among others, *Armco, Inc. v. Hardesty*, *supra*; *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318 (1977); and *Maryland v. Louisiana*, 451 U.S. 725 (1981)). What did the Washington Supreme Court cite to support its reading of prior precedent? It cited its own ruling in *National Can Corp. v. Department of Revenue*, 715 P.2d 128 (Wash. 1986) (opinion later corrected for technical reasons and reported at 732 P.2d 134), as evidence that *Armco* did not foreshadow the result in *Tyler Pipe*. 749 P.2d at 1289. It was that very decision, however, that *Tyler Pipe* reversed![11] To conclude that a State's own misreading of precedent vitiates its responsibility to follow that precedent would itself represent a clear break from sound and established principles of adjudication and could send a disturbing signal to all the States: perhaps ignorance of the law *is* an excuse.[12]

[11] *See* 483 U.S. at 232 ("We conclude that our reasons for invalidating the West Virginia tax in *Armco* also apply to the Washington tax challenged here."). In deciding not to apply *Tyler Pipe* retroactively, the Washington court also relied heavily on the decision of the West Virginia Supreme Court in *Ashland Oil Co. v. Rose*, *supra*, which was subsequently reversed by this Court in a *per curiam* opinion in *Ashland Oil Co. v. Caryl*, *supra*. 749 P.2d at 1292-94.

[12] *See Chapman v. California*, 386 U.S. 18, 21 (1967) (criminal procedure case) ("we cannot leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights").

Similarly, in *American Trucking Ass'ns v. Smith*, *supra*, the Arkansas Supreme Court averred that *Chevron Oil*'s first test focuses on "whether it was reasonable for the state to have conducted itself as it did" or whether "a reasonable person could easily have found [the tax] to pass Commerce Clause muster." *American Trucking Ass'ns v. Gray*, 746 S.W.2d 377, 378 (Ark. 1988) (refusing to apply *Scheiner* retroactively). Clearly, however, that is *not* the standard. Rather, the first factor asks whether the decision overruled "clear past precedent" or involved "an issue of first impression whose resolution was not clearly foreshadowed." *Chevron Oil*, 404 U.S. at 106. In light of the Court's earlier decision in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), the 1987 ruling of unconstitutionality in *Scheiner* can be said to have been clearly foreshadowed. *American Trucking Ass'n v. Kline*, No. 07-14-1667-85MVT (N.J. Tax Ct. Sept. 8, 1988) (unpublished opinion).[13]

Finally, in the instant case, the Virginia Supreme Court cited (among other cases) this Court's 1983 decision in *Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392, 395 (1983), which struck down on intergovernmental tax immunity grounds a state taxing scheme that imposed greater burdens on holders of federal obligations than on holders of similar state obligations, and its 1960 decision in *Phillips Chemical Co. v. Dumas Independent School District*, 361 U.S. 376, 379 (1960), which held that a state tax that imposes a greater burden on the lessees of federal property than on lessees of other exempt public property impermissibly discriminates against the federal government. Nevertheless, the state court concluded:

[13] In *Kline*, the New Jersey Tax Court held that *Scheiner* should be applied retroactively. The court stated that "[e]ven if *Complete Auto Transit* did not specifically overrule the [cases on which the Arkansas court in *Scheiner* had relied] . . . the invalidity of flat taxes which discriminate as a matter of practical effect was clearly foreshadowed by *Complete Auto Transit*." Slip Op. at 9.

> [I]t is difficult to discern how the General Assembly of Virginia should have been expected to perceive that a statutory scheme, exempting state pensioners from state taxation, would have placed any foreseeable and direct burden on some federal operation.

App. C, at 12a. Such a conclusion, moreover, came despite the clear statement in *Phillips Chemical Co.* that a State must treat "those who deal with the [Federal] Government"—the federal pensioners here—"as well as it treats those with whom it deals itself"—the state pensioners. 361 U.S. at 385.[14]

That the States' application of *Chevron Oil*'s new principle test is driven more by their desire to deny responsibility for their unconstitutional acts than by a reasonable interpretation of that case is perhaps best illustrated by the brief *amici curiae* that Virginia and 28 States, the District of Columbia, Guam, and the Virgin Islands filed last term in *Allied-Signal, Inc. v. Director, Division of Taxation*, 112 S. Ct. 2251 (1992).[15] In that case, which involved the potential overruling of two Supreme Court decisions—*ASARCO Inc. v. Idaho State Tax Commission*, 458 U.S. 307 (1982), and *F.W. Woolworth Co. v. Taxation & Revenue Department*, 458 U.S. 354 (1982)—the Court invited briefs on whether any such overruling should be retroactive. Although the case would have involved the overruling of express and directly applicable Supreme Court precedent of less than ten years' duration (which itself relied on an unbroken chain of Supreme Court decisions dating back to 1875), the States had no problem in boldly arguing that "the *Chevron Oil* test can accommodate both an overruling decision and a holding of retroactivity." Brief by Alabama, *et al.*, *Allied-Signal, Inc. v. Director, Division of Taxation*, *supra*, at 16. Such an "accommodation," however, seems completely untethered by consistency. Hence, for the States, the coin of the realm frequently seems not to be principle but greed.

[14] *See United States v. City of Spokane*, 918 F.2d 84, 89 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 2888 (1991) (city tax on the local Red Cross—an instrumentality of the United States—struck down and decision applied retroactively; the court found the city's defense unpersuasive on the grounds that, in view of the strong constitutional prohibition against state governments' taxing federal instrumentalities, the city should have had doubts about the propriety of its action).

[15] Brief by Alabama, Arizona, Arkansas, Colorado, District of Columbia, Florida, Georgia, Guam, Indiana, Kentucky, Louisiana, Michigan, Mississippi, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, South Dakota, Texas, Utah, Virgin Islands, Virginia, Washington, West Virginia, Wisconsin, and Wyoming as Amici Curiae in Support of Respondent, *Allied-Signal, Inc. v. Director, Division of Taxation*, 112 S. Ct. 2251 (1992) (No. 91-615).

Where the Court expressly overrules one of its own decisions (as the State of New Jersey proposed in *Allied-Signal*), the new principle prong of *Chevron Oil* is manifestly satisfied: the new decision represents a clear break with the past. Nonretroactivity would seem especially compelling where the case involves a dilution of taxpayers' Commerce Clause or other constitutional rights (not their enhancement). In such cases (unlike the situation where the Court invalidates a state tax statute), there is no question of constitutional wrongdoing by the losing litigant, but rather the potential sanctioning of a scheme of state taxation that previously was found to contravene the Constitution. Thus, the adversely affected taxpayers would not have been found to have violated a legal or constitutional duty or to have impaired the Due Process, Equal Protection, and Commerce Clause rights of any one. *Cf.* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731, 1745 (1991) ("[a] basic asymmetry exists between decisions contracting and those expanding the domain of individual rights."). In other words, where the Court moves to constrict the protections afforded by the Constitution, it should do so on a retro-

active basis.[16] As Justice Scalia wrote in *Quill Corp. v. North Dakota*, 112 S. Ct. 1904 (1992), "we ought not visit economic hardship upon those who took us at our word." *Id.* at 1924 (Scalia, J., with Kennedy & Thomas, J.J., concurring).

The State *amici* in *Allied-Signal* noted that "[i]f the Supreme Court overrules a precedent under which a state tax statute would have been unconstitutional, it is the taxpayer whose reliance interest will be unsettled by a fully retroactive application of the decision" and concluded that "[i]n some instances, retroactive taxation may be a fair result; in other instances, it clearly will not be." Brief by Alabama, *et al.*, *Allied-Signal, Inc. v. Director, Division of Taxation*, *supra*, at 17, 18. Nevertheless, the States too often have defined "fair" as they define "new principle": to suit their needs.

B. Would Prospective-Only Treatment Advance or Retard the Operation of the New Rule?

Chevron Oil's second test addresses whether nonretroactive application of the new rule will advance or retard the operation of that rule. 404 U.S. at 106-07. That the States systematically misapprehend the import of the standard is demonstrated by the state courts' decisions in *National Can* and *American Trucking Ass'ns v. Smith*, as well as by the lower court opinion in this case.

[16] Whereas retroactive application of decisions holding particular taxes unconstitutional—such as in *McKesson*—provides a clear incentive for States to avoid unconstitutional taxes, Fallon & Meltzer, *supra*, at 1829, the opposite incentive would be provided by the retroactive overruling of taxpayer-favorable precedent: the States would be encouraged to disregard this Court's clear holdings and to construct taxing schemes that run contrary to long-established principles such as the unitary business principle. Such an occurrence would be tremendously disruptive. Nothing would be settled and the States would be continually emboldened to impose unconstitutional taxes on the chance that, one day, this Court might relent in its reasoned interpretation of the Constitution's Due Process, Equal Protection, and Commerce Clauses.

In the Arkansas case, the court blithely quoted the Washington Supreme Court in *National Can*, as follows:

> It is difficult to understand how retroactive application would encourage free trade among the states since whatever chill was imposed on interstate commerce is in the past. . . .

American Trucking Ass'ns v. Gray, 746 S.W.2d at 379 (quoting *National Can Corp.*, 749 P.2d at 1291).

In the instant case, the Virginia Supreme Court took a different tack. It argued that retroactive application of the *Davis* decision was unnecessary to advance the principle of intergovernmental tax immunity because the Commonwealth of Virginia promptly stopped its unconstitutional practice of discriminating against federal annuitants after the *Davis* decision:

> As soon as the General Assembly became aware of the *Davis* decision, it acted to correct the defects in its statute. . . . As a result, the purpose of the intergovernmental tax immunity doctrine already has been fully served, and applying *Davis* retroactively would do nothing either to retard or to further the doctrine's purpose.

App. C, at 12a.

The courts in these cases, however, fail to recognize that the purpose of constitutional adjudication is not merely to vindicate the rights of the litigants before the Court or even of identically situated taxpayers. The purpose is to effectively discourage future violations of those rights. Under the States' reading of *Chevron Oil*'s purpose test—assuming the absence of "massive resistance" by the States—a ruling of unconstitutionality would never be applied retroactively, for the States would presumably always relent (eventually) when the Court held against them. At the same time, however, the States would have an incentive to enact unconstitutional statutes—to "roll the dice" with the constitutional rights of taxpayers, knowing that—at worst—they may have to mend their

ways in the future.[17] The overall result, therefore, could not help but frustrate the very principles the core decision was intended to guarantee. Indeed, an excessively loose interpretation of *Chevron Oil* would likely dissuade taxpayers from contesting the constitutionality of dubious state taxing schemes by depriving them of any economic benefit from a successful challenge. The failure of the Court to accord taxpayers anything more than a pyrrhic victory would assuredly chill efforts to secure their Commerce Clause and related rights.[18]

C. Is Prospective-Only Application Necessary to Avoid Injustice or Hardship?

The States' discussion of the inequity test in *Chevron Oil* is particularly troubling. Under *Chevron Oil*, the issue is whether prospective application is necessary to

[17] *See* Tatarowicz, *supra*, 41 Tax Lawyer at 141-42 ("the practical effect [of prospective-only application] would be to permit states the financial benefits of discriminatory taxation. A state could enact tax laws without concern for constitutional limitation, knowing that, if such laws were ultimately found to discriminate against interstate commerce, they could be repealed with impunity. . . . [T]he prospective application of a finding of unconstitutionality retards the purpose of the commerce clause by offering the inducement of a clear financial advantage to those states that violate it.").

[18] In addition, the States' denial of refunds could disrupt the tax administrative practice in the States by encouraging taxpayers not to pay the suspect tax (rather than to pay the tax and then claim a refund). For example, *amicus* TEI understands that following this Court's recent decision in *Kraft General Foods, Inc. v. Iowa Department of Revenue & Finance*, 112 S. Ct. 2365 (1992), the State of Iowa issued a refund to the litigant, and dropped its claims against taxpayers that refused to pay the unconstitutional tax; however, the State, to date, has declined to pay refunds to similarly situated taxpayers that paid the tax and subsequently filed claims for refund. Telephone Interview with John V. Donnelly, Counsel for Kraft General Foods, Inc. (Aug. 4, 1992). Such a practice, which seems inconsistent with *Beam*'s proscription on selective prospectivity, will not only disadvantage those taxpayers that followed the States' prescribed refund procedure but also impel taxpayers to avoid the situation in the future by refusing to pay the tax in the first instance.

avoid injustice or undue hardship. 404 U.S. at 107. In *National Can*, the Washington court focused on the State's "reliance" on the unconstitutionally imposed and collected taxes, stating that "the expenditures made from this revenue . . . cannot be undone, and reimbursement at this point would pose a significant hardship upon the State's existing financial requirements." 749 P.2d at 1293.

Similarly, in *American Trucking Ass'ns v. Smith*, the Arkansas court raised the specter of a hardship in referring to the State's having spent or "counted on" the collected unconstitutional taxes. 746 S.W.2d at 379.[19] It also made reference to the "unconscionable windfall" that the petitioners would receive if refunds were ordered, *id.*, an argument that the Florida Supreme Court invoked in *Division of Alcoholic Beverages & Tobacco v. McKesson Corp.*, 524 So. 2d 1000, 1010 (Fla. 1988) (references to "equitable considerations" and to the "windfall" petitioners would "in all probability" receive, on the assumption that the unconstitutional taxes had been passed on to customers).

In the instant case, the Virginia Supreme Court also discussed "the effect that retroactive application of a judicial decision may have on a state's financial stability." App. C, at 13a. The court explained:

> [R]etroactive application of the *Davis* decision would give rise to a potential tax refund liability, inclusive of interest, of approximately $440,000,000. This liability would come at a time when the Commonwealth is already struggling to meet enormous fiscal deficits. The record . . . support[s] the conclusion that allowing the requested refunds would have a potentially

[19] That the State of Arkansas had already expended the unconstitutional taxes, or at least taken them into account for budgeting purposes, was the court's justification for refusing to order refunds of the taxes collected during a period commencing with the Court's decision in *Scheiner* and the establishment of an escrow account. 746 S.W.2d at 378-79.

> disruptive and destructive impact on the Commonwealth's planning, budgeting, and delivery of essential state services.

App. C, at 13a-14a (citations omitted).[20]

Amicus TEI believes that the States' "windfall"/"inequity" analysis focuses on the wrong party. The issue is not whether an aggrieved taxpayer might enjoy a benefit from lodging a successful challenge to an unconstitutional statute; that is often the case. Rather, it is whether there are factors present that, despite the losing State's culpability, militate against the general rule of retroactivity. Thus, the inequity test measures the hardship or injustice that might befall the State and balances that hardship against the right (constitutional or economic) that would be fully vindicated only by the retroactive application of the decision.

Under a properly framed inequity test, there should be no doubt that the "hardship" endured by the States—its required refund of unconstitutional taxes that had been "counted on"—should generally not pass muster. Indeed, if such a "hardship" were deemed sufficient to justify prospective treatment, unconstitutional tax statutes would rarely, if ever, be overturned retroactively. States invariably spend the revenues they collect. The sounder approach is to examine whether *undue* hardship would result from retroactive application of a decision. Under such an analysis, a different result will generally obtain, for the "hardship" of which the States might complain is one of their own making—the result of their own unconstitutional acts.[21] Thus, the large amount of refunds

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[20] There is no question whether the taxpayers in the instant case have "passed on" the discriminatory tax that was imposed on them. They clearly did not and, hence, could not possibly enjoy any "windfall" if refunds are ordered.

[21] For example, in the *Tyler Pipe* case, the state court refused to enjoin collection of the taxes prior to a decision on the merits on the grounds that the taxpayers' right to a refund would be an adequate remedy if the taxpayers prevailed. *Tyler Pipe Indus. v. Department of Revenue*, 638 P.2d 1213, 1214, 1216 (Wash. 1982). When the taxpayer did prevail on the merits, the Washington Supreme Court refused to order refunds based on the alleged "hardship" such refunds would cause the State. *National Can Corp.*, 749 P.2d at 1293. In point of fact, however, any "hardship" could have been substantially mitigated had the State heeded the advice of its own Director of Revenue who, two days after this Court's decision in *Armco*, advised the Governor that "the reasoning of the Court in the *Armco* decision is clearly applicable to our statutory arrangement . . . ." Memorandum to the Honorable John Spellman, Governor, from Donald R. Burrows, Washington State Director of Revenue (June 14, 1984), *reprinted at* Exhibit F of the Appendix to Jurisdictional Statement of Appellants National Can Corporation, *et al.*, at 80a, *National Can Corp. v. Washington Dep't of Revenue*, 486 U.S. 1040 (1988) (No. 87-1629) (*cert. denied*). Had the Director's concern been acted upon, the collection of unconstitutional taxes could have ended more than three years before the Court's decision in *Tyler Pipe*. Instead, the State continued its efforts to enforce the discriminatory taxes in violation of the Commerce Clause, thereby exacerbating the "hardship" of which it subsequently complained.

at issue in this case was not determined in an arbitrary, willy-nilly fashion: it is the precise amount of tax that was unconstitutionally exacted from aggrieved taxpayers.

What is more, the States are not without power to address any resulting revenue shortfall. Clearly, they are empowered to levy and collect taxes equal to the amount of any refunds. The question is whether the fiscal hole is to be filled through constitutional or unconstitutional means. *Amicus* TEI suggests that to pose the question is to answer it.

In this regard, it is instructive to consider those cases in which the Court has provided relief under the inequity prong of the *Chevron Oil* test (or comparable standards). For example, in *Lemon v. Kurtzman*, 411 U.S. 192 (1973) (*Lemon II*), the Court limited the effect of its decision two years earlier in *Lemon v. Kurtzman*, 403 U.S. 602, 625

(1971) (*Lemon I*), which invalidated, on First Amendment grounds, a Pennsylvania statute authorizing State reimbursement to private sectarian schools for certain educational services provided by the schools. 411 U.S. at 207-09. The hardships with which the Court was concerned in that case were not the State's but rather the private schools that had provided services and incurred expenses in reliance on the constitutionally defective statute. *Id.* at 203-04. Indeed, the State would have been relieved of a financial burden had the Court applied its decision on a retroactive basis.

Similarly, in *Cipriano v. City of Houma*, 395 U.S. 701 (1969), the Court limited the retroactive effect of a decision holding unconstitutional a Louisiana statute permitting only property taxpayers to vote in elections called to approve the issuance of public utility revenue bonds. The hardship addressed by the Court was again not the State's but that which would have been suffered by cities and bondholders (who had relied on the state law) had the decision been applied retroactively. *Id.* at 706.[22]

Thus, in applying the inequity test, the Court has focused on whether hardship would befall parties or other individuals who did not have it within their power to rectify the situation by adopting the rule in question. The States clearly have the power to enact constitutional, nondiscriminatory tax statutes. That they choose not to,

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[22] *See also Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87-88 (1982) (decision holding the Bankruptcy Act of 1980 unconstitutional applied prospectively because of the substantial injustice and hardship that would otherwise be visited upon litigants who had relied on the statute); *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 722-23 (1978) (decision that city department's employee benefit plan violated Title VII of the Civil Rights Act of 1964, as amended, applied prospectively because of "devastating" effect retroactivity could have "in large part on innocent third parties"—the covered employees).

should not grant them license to retain their ill-gotten gains.[23]

Moreover, even assuming the States could demonstrate that they would suffer an undue hardship if compelled to refund immediately all unconstitutionally collected taxes, it does not follow—as many States have alleged—that the wronged taxpayers should receive nothing.[24] In appropriate cases, a State might—perhaps under guidelines prescribed by the legislature—craft a refund policy that minimizes the "inequity" otherwise incurred. For example, a State might provide that the taxes unconstitutionally collected (plus an interest factor) could be claimed as a credit on the affected taxpayers' future years' tax returns.[25]

In summary, far too frequently, the States have ignored or misconstrued all three of *Chevron Oil*'s tests. Their failure to analyze *Chevron Oil* properly, if not rectified, could be used to sanction prospective-only application in respect of virtually all decisions declaring state tax statutes unconstitutional. Such a result would be pernicious

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[23] As Justice Mitchell so aptly put it in *Swanson v. North Carolina*, *supra*, "[t]here simply is nothing 'inequitable' or wrong about ordering that the State not pick a taxpayer's pocket or in requiring it to return the money when it is caught doing so." 407 S.E.2d at 797 (Mitchell, J., dissenting). *See also id.* ("I am unable to see the 'inequity' involved in requiring the State to return any money it has unconstitutionally taken from the plaintiffs."); *Sheehy v. Montana*, 820 P.2d 1257, 1269 (Mont. 1991) (Trieweiler, J., dissenting) ("What is equitable about allowing the State, with all its power, to illegally seize someone's property, and then after being told what it did was illegal, allowing the State to keep it?"), *petition for cert. pending*, 60 U.S.L.W. 3675 (U.S. March 31, 1992) (No. 91-1473).

[24] Obviously, the hardship suffered by the States in such an instance would be no greater than the hardship collectively suffered by the taxpayers from whom the taxes were unconstitutionally exacted.

[25] Tatarowicz, *supra*, 41 Tax Lawyer at 143 & n.248. Alternatively, the taxes at issue could be refunded in installments. 41 Tax Lawyer at 143.

—nullifying the Court's decisions on constitutional issues and frustrating the policy underlying the Commerce Clause, as well as the Due Process, Equal Protection, and Supremacy Clauses.

III.

Although the instant case involves unique questions related to the purpose and scope of the Supremacy Clause and the doctrine of intergovernmental tax immunity, the governing principles potentially have broad application to a whole range of cases involving the validity of state taxing schemes under the Commerce, Due Process, and Equal Protection Clauses. Indeed, the instant case represents only the most recent testimony of the need to clarify the *Chevron Oil* standard in order to vindicate basic constitutional principles. In recent years there has been a veritable wave of state court decisions in which discriminatory statutes have been found, in essence, to be unconstitutional on a prospective-only basis. Among the States that have held this Court's precedents to have little or no retroactive effect are West Virginia, Michigan, Washington, New Jersey, North Dakota, Kentucky, Oklahoma, Ohio, Florida, New York and Arizona.[26]

These cases vividly illustrate that the States, at best, misunderstand the balance that is to be struck in considering the retroactivity question and, at worst, have virtually no regard for the policies underlying the Commerce Clause, Due Process Clause, and Equal Protection Clause, or for the precedents of this Court. State after State has adopted what can be described as a "heads I

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[26] For a list of cases in which state courts have applied decisions that a tax is unconstitutional on a prospective-only basis, see Tatarowicz, *supra*, 41 Tax Lawyer at 117-18 n.89. Not all States have refused to accord the Court's decisions retroactive effect. *Compare American Trucking Ass'ns v. Goldstein*, 541 A.2d 955, 961 (Md. 1988) (overturning the State of Maryland's effort to postpone the effective date of the *Scheiner* decision for a nearly a year); *American Trucking Ass'n v. Kline*, *supra* (*Scheiner* applied retroactively); *American Trucking Ass'ns v. Conway*, 566 A.2d 1235, 1340-42 (Vt. 1989) (*Scheiner* applied retroactively).

win, tails you lose" approach to cases implicating the Constitution's proscription on discriminatory tax statutes. If a State prevails in litigation and the challenged statute is sustained, all taxpayers (rightfully) lose. But if a State loses and the statute is found to be constitutionally deficient, the State then declares that the decision established a "new principle" and, therefore, that it should receive prospective-only application. As a result, all taxpayers (with the possible exception of the victorious litigant who in any event may have incurred substantial costs) lose.

Perhaps most objectionable is the States' distending the equity prong of *Chevron Oil*. The States' argument that they have "already spent the money" parallels that of the child who murders his parents and then throws himself on the mercy of the Court as an orphan. *Amicus* TEI recognizes that the analogy is not wholly apt and that the fiscal straits in which the States find themselves are not to be cavalierly dismissed. Nor, however, should they excuse concededly unconstitutional acts. The States should not be free to pass unconstitutional laws, to exact tribute from taxpayers in a discriminatory manner, to spend the money, and then, when caught, to plead poverty.

The States' protestations of good faith, their adroit reading of precedent, and their deft, self-serving application of *Chevron Oil* may enrich their fisces, but the results can hardly be said to foster the policy underlying the Constitution (and, in particular, the Commerce Clause). Unless the *Chevron Oil* standard is clarified, not only may States be emboldened to ignore constitutional concerns but taxpayers may also be discouraged from challenging clearly discriminatory tax statutes.

Hence, this Court should end its willing suspension of disbelief. Time and time again this Court has held state taxing schemes unconstitutional and remanded the cases for action "not inconsistent with this opinion." *E.g.*, *Tyler Pipe*, 483 U.S. at 253. And time and time again,

the States have demurred, effectively averring that a constitutional consistency is the hobgoblin of compliant minds.[27] The wave of prospective-only holdings that have ensued fail the test of consistency—with respect both to constitutional principles and the Court's teaching in *Chevron Oil*. It should be stopped.

IV.

Amicus Tax Executives Institute respectfully submits that, in light of the States' repeated misapplication of the *Chevron Oil* standard, the Court might properly not only clarify and thereby vivify that standard, but also give consideration to the adoption of a new standard in respect of state tax statutes found to violate the Commerce Clause.

In Griffith v. Kentucky, 479 U.S. 314 (1987), this Court considered—and found constitutionally repugnant—the racially discriminatory use by prosecutors of peremptory challenges. Declaring that "[t]he time for toleration has come to an end," 479 U.S. at 323 (*quoting United States v. Johnson*, 457 U.S. 537, 555-56 n.16 (1982)), the Court concluded that generally new rules for the conduct of criminal prosecutions will be applied retroactively to all pending or non-final cases even if they constitute a "clear break" with the past. 479 U.S. at 328. *See* Tribe, *supra*, at 31 n.26.

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[27] After this Court's decision in *Beam*, the *Harper* case and two other cases were vacated and remanded for further action by the State courts. *Harper v. Virginia Department of Revenue*, 111 S. Ct. 2883 (1991); *Bass v. South Carolina*, 111 S. Ct. 2881 (1991); *Norwest Bank Duluth v. James*, 111 S. Ct. 2881 (1991) (involving retroactive application of *Memphis Bank*). In all three cases, the courts refused to order refunds of the unconstitutionally collected taxes. *Harper*, App. A at 5a; *Bass v. South Carolina*, 414 S.E.2d 110, 115 (S.C. 1992), *petition for cert. pending*, 60 U.S.L.W. 3755 (U.S. April 24, 1992) (No. 91-1697); *Cambridge State Bank v. James*, 480 N.W.2d 647, 652 (Minn. 1992), *petition for cert. pending sub nom., Norwest Bank Duluth v. James*, 61 U.S.L.W. 3001 (U.S. July 7, 1992) (No. 91-2047).

Although cases addressing the validity of discriminatory state tax statutes do not involve considerations of the same magnitude as those presented in criminal procedure cases, such cases do implicate a constitutional right—an interstate business's right under the Commerce Clause and related provisions to be free from undue state-imposed burdens. They clearly involve rights different from, and indeed more significant than, the statute of limitations issue presented in *Chevron Oil*. Thus, in considering whether the *Chevron Oil* test should be supplanted by an even more stringent standard in all constitutional cases, the Court should give full weight to the type of interest involved. In criminal cases—where a liberty interest is at stake—the Court has already insisted on full retroactivity. Where the Commerce Clause or related Due Process or Equal Protection rights of taxpayers are implicated—or where, as here, the Supremacy Clause is involved and the litigant is not the United States but ancillary beneficiaries—a vivified *Chevron Oil* standard should permit prospective-only treatment only in rare cases. Hence, unlike the other civil cases in which the retroactivity issue has been considered, the unsuccessful litigant in a discriminatory state tax case—the party who seeks to have the finding of unconstitutionality applied on a prospective-only basis (the State)—is the progenitor of the proscribed (unconstitutional) action.

Because the States have it within their power to enact constitutional tax statutes, they should be held to a higher standard in obtaining exceptions to the general rule of retroactivity. States should ordinarily not be permitted to reap the benefits of discriminatory taxation while impairing the constitutional rights of taxpayers. The States' checkered history in enacting, collecting, and refusing to refund unconstitutional taxes only underscores this conclusion.

Too frequently, the States seem unable to abide by the rules and to face up to the consequences of their actions.

Like the person who continually promises to reform but repeatedly fails, the word of the States should no longer be considered sufficient: they should be judged by their actions, and their actions should be found wanting. It is time for judicial intervention, for the Constitution to prevail over the States' protestations of good faith. As the Court so forcefully proclaimed in *Griffith v. Kentucky*: "The time for toleration has come to an end." 479 U.S. at 323.

CONCLUSION

For the foregoing reasons, the Court should clarify the standard to be used in determining whether its decisions should be given prospective-only effect.

Respectfully submitted,

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